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Nanya Technology Corp. U.S.A.*

**FILED**  
DISTRICT COURT OF GUAM

JAN 17 2007 *mla*

MARY L.M. MORAN  
CLERK OF COURT

**UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM**

NANYA TECHNOLOGY CORP. AND  
NANYA TECHNOLOGY CORP. U.S.A.,

Plaintiffs,

vs.

FUJITSU LIMITED AND FUJITSU  
MICROELECTRONICS AMERICA, INC.,

Defendants.

Case No. CV-06-00025

**PLAINTIFFS' MOTION TO CLARIFY  
MAGISTRATE JUDGE'S ORDER AND  
MOTION TO COMPEL SUBSTANTIVE  
RESPONSES TO PLAINTIFFS'  
DISCOVERY REQUESTS**

**[NO ORAL ARGUMENT REQUESTED]**

**I.**

**INTRODUCTION**

On December 11, 2006 the Court Ordered a short postponement of the scheduling conference originally scheduled for December 12, 2006. *See* Court Order, December 11, 2006 ("Order") [Docket

No. 87]. In doing so, the Court noted that the short delay in discovery [on the merits] would not prejudice Nanya Technology Corporation's interests, but would allow the Court an opportunity to address the jurisdictional and service challenges by the Defendants.

Defendant Fujitsu Microelectronics America, Inc. ("FMA") is now attempting to use the Court's Order to avoid substantively answering pending jurisdictional discovery. In a telephone conference on Friday, January 12, 2007, FMA's counsel informed Nanya's counsel that FMA will only object to the jurisdictional discovery and not respond to discovery requests because FMA interprets the Court's December 11, 2006 Order as staying all discovery in the case. *See* Declaration of Alfonso Garcia Chan ("Chan Decl."), ¶4, attached hereto as Exhibit A. The discovery that FMA is attempting to avoid answering is targeted solely to the jurisdictional challenge raised by FMA that is set for response and hearing in a few weeks. FMA knows that its discovery responses are necessary for Nanya to defeat its challenge to jurisdiction, and its refusal to answer is designed to force motion practice that will delay this action in favor of FMA's later-filed case in Oakland, California.<sup>1</sup> FMA's gamesmanship has no place in a federal District Court.

FMA's claim that the Court stayed all discovery is completely at odds with the Court's Order, the posture of the case, Ninth Circuit case law and common sense. Contrary to FMA's misinterpretation, the Court ignored FMA's request for a sixty-day extension and instead postponed the scheduling conference for a brief period. *See* Order. Nowhere in its Order did the Court grant FMA's request to stay the commencement of merits discovery, much less the jurisdictional discovery needed to respond to FMA's motion. Instead, the Court encouraged the parties to resolve the issue of whether the parties were properly before the Court. On December 14, 2006, Plaintiffs served FMA with discovery requests calling for information necessary to challenge FMA's allegations that it was

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<sup>1</sup> *Fujitsu Limited and Fujitsu Microelectronics America, Inc. v. Nanya Technology Corp. and Nanya Technology Corp. U.S.A.*, Case No. C-06-06613 EDL.

1 not subject to this Court's jurisdiction. *See* Plaintiffs' First Set of Requests for Production, attached  
2 hereto as Exhibit B. On January 12, 2007, FMA informed Nanya's counsel that it planned to only  
3 object to the discovery and to refuse to provide substantive responses. *See* Chan Decl. at ¶4. Because  
4 FMA's refusal to comply with its obligations is based upon a false and tortured interpretation of the  
5 Court's December 11, 2006 Order, Plaintiffs move the Court to clarify its Order and compel FMA to  
6 respond substantively to Plaintiffs' jurisdictional discovery requests.  
7

## 8 II.

### 9 **IN PARTIALLY GRANTING FMA'S MOTION, THE COURT POSTPONED** 10 **THE SCHEDULING CONFERENCE TO DETERMINE WHETHER THE** 11 **PARTIES ARE PROPERLY BEFORE THE COURT**

12 In its December 11, 2006 Order, the Court granted in part FMA's Motion to Extend Time  
13 specifically stating that "[t]he scheduling conference presently calendared for December 12, 2006, is  
14 hereby moved to Tuesday, January 30, 2007, at 9:30 a.m." *See* Order at 3. The Court then directed the  
15 Clerk of Court to return all previously submitted scheduling orders and discovery plans to the  
16 respective parties and instructed the parties to prepare a joint scheduling order and discovery plan no  
17 later than January 24, 2007. *Id.* Contrary to FMA's assertions, the Court did not stay discovery.  
18

19 In outlining the reasons for its Order, the Court stated that resolving pending service issues and  
20 assuring that all parties are properly before the Court would be more practical and make better use of  
21 judicial resources. *See* Order at 2. Specifically, the Court explained, "it is important that all parties  
22 participate fully in the drafting of said scheduling order" and that it would be "inefficient to have  
23 piecemeal scheduling discussions not involving all of the parties." *Id.*  
24

25 Pending before the Court at the time of its Order was FMA's Motion to Dismiss or Transfer  
26 [Docket No. 74]. In its motion, FMA argued that it was not properly before the Court and that the  
27 Court should either dismiss the case or transfer it to the Northern District of California. To comply  
28 with the Court's objective of resolving the parties' status, three days after the Order, Plaintiffs promptly

1 served FMA with requests for production that specifically addressed jurisdictional issues FMA raised  
2 in its motion. See the Declaration of Alfonso G. Chan, attached hereto as Exhibit A. FMA, however,  
3 has indicated to Plaintiffs that it interprets the Order to stay all discovery – including jurisdictional  
4 discovery -- and therefore, FMA would not respond substantively to Plaintiffs' discovery requests. See  
5 Chan Decl. at ¶4.  
6

### 7 III.

#### 8 **FMA'S REFUSAL TO ANSWER DISCOVERY REQUESTS** 9 **IGNORES THE COURT'S CONCERNS AND INSTRUCTIONS**

10 FMA's refusal to respond substantively to Plaintiffs' jurisdictional discovery is inconsistent  
11 with the Court's objective of resolving whether all parties are properly before the Court. It is equally  
12 dismissive of the Court's express concern for conserving judicial resources. See *Netflix, Inc. v.*  
13 *Blockbuster, Inc.*, Slip Copy, No. C 06-02361 WHA, 2006 WL 2458717 (N.D. Cal. Aug. 22, 2006) ("It  
14 is the interest of efficient judicial administration that is to be controlling under the rule, rather than the  
15 wishes of the parties" (quoting Wright & Miller, *Federal Practice and Procedure*, § 2388 (2d ed.  
16 Pocket part 2006)); *U.S. Philips Corp. v. Synergy Dynamics International, L.L.C., et al.*, Slip Copy, No.  
17 2:05-cv-00577-PMP-GWF, 2006 WL 3453225 \*3 (D. Nev. Nov. 28, 2006) ("[D]iscovery should be  
18 stayed, however, only when there are no factual issues in need of further immediate exploration, and  
19 the issues before the Court are purely questions of law that are potentially dispositive.") FMA's  
20 position is further untenable given the Court's instruction to "meet and confer in a good faith effort to  
21 prepare a proposed joint scheduling order and discovery plan." See Order at 3. To prepare a joint  
22 scheduling order and discovery plan in good faith while the status of the parties remains in dispute  
23 would be futile and inefficient. Aware of this danger, the Court expressly did not stay discovery.  
24 Instead, the Court postponed the Scheduling Conference for a short period to permit the parties to  
25 attempt to resolve the pending issues. See *Feldman et al. v. Flood et al.*, 176 F.R.D. 652 (M.D. Fla.  
26 1997) ("Motions to stay discovery ... are not favored because when discovery is delayed or prolonged  
27  
28

1 it can create case management problems which impede the Court's responsibility to expedite discovery  
2 and cause unnecessary litigation expenses and problems. ... [T]he Court ordinarily should not stay  
3 discovery which is necessary to gather facts in order to defend against the motion [pending motions]."

4 Cited in *GTE Wireless, Inc. v. Qualcomm, Inc.*, 192 F.R.D. 289 (S.D. Cal. 2000)).

5  
6 Plaintiffs served their jurisdictional discovery requests promptly after the Court's Order  
7 specifically to address whether FMA is properly before the Court. FMA, however, rather than  
8 cooperating with Plaintiffs and complying with the Court's instruction, seeks to delay this action by  
9 purposely ignoring Plaintiffs' requests. Instead, FMA maintains its tenuous and illogical position that  
10 the only way to resolve the parties' status before the Court is to refuse to answer questions that directly  
11 address that issue. Explicit in the Court's reasoning is a desire for the case to proceed in an efficient  
12 manner. See *U.S. Philips Corp.*, Slip Copy, No. 2:05-cv-00577-PMP-GWF, 2006 WL 3453225 \*4  
13 ("The decision whether to grant a stay of discovery still requires the court to determine whether the  
14 issues before the court ... are purely questions of law that can and should be decided before the parties  
15 engage in burdensome, expensive, and potentially unnecessary discovery. ... Rule 26(c) ... is to be  
16 construed and administered ... to secure the just, speedy and inexpensive determination of every  
17 action."). Plaintiffs' efforts to address the Court's concerns have been thwarted by FMA's  
18 intransigence.

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IV.

CONCLUSION

Because of FMA's unwillingness to provide substantive responses to Plaintiffs' discovery requests, Plaintiffs move the Court to clarify its Order of December 11, 2006 to make it clear that jurisdictional discovery is allowed and that responses must be timely made.

Respectfully submitted this 17<sup>th</sup> day of January, 2007.

TEKER TORRES & TEKER, P.C.

By

  
JOSEPH C. RAZZANO, ESQ.

Attorneys for Plaintiffs, *Nanya Technology Corp. and  
Nanya Technology Corp. U.S.A*

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## **EXHIBIT A**

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Nanya Technology Corp. and  
Nanya Technology Corp. U.S.A.

**UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM**

NANYA TECHNOLOGY CORP. AND  
NANYA TECHNOLOGY CORP. U.S.A.,

Plaintiffs,

v.

FUJITSU LIMITED AND FUJITSU  
MICROELECTRONICS AMERICA, INC.,

Defendants.

Case No. CV-06-00025

DECLARATION OF ALFONSO G. CHAN  
IN SUPPORT OF PLAINTIFFS' MOTION  
TO CLARIFY MAGISTRATE JUDGE'S  
ORDER AND MOTION TO COMPEL  
SUBSTANTIVE RESPONSES TO  
PLAINTIFFS' DISCOVERY REQUESTS

I, ALFONSO G. CHAN, hereby declare as follows:


1. My name is Alfonso G. Chan. I am over the age of 21 and am competent to make this declaration. All of the statements set forth herein are true and correct and are based on my personal knowledge.

1           2.     I am an attorney of record for Plaintiffs Nanya Technology Corporation and Nanya  
2 Technology Corporation U.S.A. ("Nanya" collectively herein) in the above-captioned cause.

3  
4           3.     Attached as Exhibit B is a true and correct copy of Plaintiffs' First Set of Requests for  
5 Production of Documents which was served on counsel for Fujitsu Microelectronics America, Inc.  
6 ("FMA") on December 14, 2006.

7  
8           4.     On January 12, 2007, Michael Shore, my law partner, and I, along with three other  
9 attorneys from our firm, participated in a telephone conference with FMA's counsel, Christopher  
10 Chalsen, and several of his colleagues. According to my personal recollection of Mr. Chalsen's and his  
11 colleagues' statements, FMA objects to the jurisdictional discovery attached as Exhibit B because it  
12 interprets the Court's December 11, 2006 Order as staying all discovery in the case, including  
13 jurisdictional discovery.  
14

15  
16  
17 Dated: January 15, 2007

  
Alfonso G. Chan

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**EXHIBIT B**

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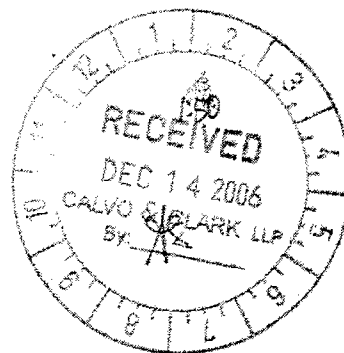
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**IN THE DISTRICT COURT OF GUAM**

**NANYA TECHNOLOGY CORP., and  
NANYA TECHNOLOGY CORP. U.S.A.,**

**Plaintiffs,**

**vs.**

**FUJITSU LIMITED, FUJITSU  
MICROELECTRONICS AMERICA, INC.,**

**Defendants.**

**CIVIL CASE NO. CV06-00025**

**PLAINTIFF'S FIRST REQUEST FOR  
PRODUCTION OF DOCUMENTS  
TO DEFENDANT FUJITSU  
MICROELECTRONICS  
AMERICA, INC.**

**To: Defendant, Fujitsu Microelectronics America, Inc., by and through its attorneys of record, Calvo & Clark, LLP.**

Plaintiff hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure ("FRCP"), that Defendant, Fujitsu Microelectronics America, Inc. ("Defendant FMA"), produce and permit

Plaintiff's attorneys to inspect and to copy each of the following documents belonging to or in the possession of Defendant FMA.

These requests shall be deemed to be continuing and any additional information or documents relating in any way to these requests that you acquire subsequent to the date of answering these requests and up to and including the time of trial shall be furnished, promptly after such information or documents are acquired, as supplemental responses to these requests.

#### **DEFINITIONS**

1. "Documents" means the original and any non-identical copy of all "writings," "recordings" and "photographs" as those terms are defined in the FRCP including, but not limited to letters, facsimile communications, electronic mail ("e-mail") communications, telegraphs, cablegrams, telexes, memoranda, notes, records, reports, studies, calendars, diaries, agenda, minutes, books, pamphlets, periodicals, newspaper clippings, graphs, index, charts, tabulations, statistical accumulations, ledgers, financial statements, accounting entries, press releases, contracts, affidavits, transcripts, legal documents, records of meeting and conferences, records of conversation and telephone calls, still photographs, video tapes, motion pictures, tape recordings, microfilm, punch cards, programs, printouts, lie detector techniques and the written information necessary to understand and use such films and records.

2. A document "relating to" or that "relates to" any given subject means any document that in whole or in part constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any way pertinent to that subject, including without limitation, document concerning the preparation of other documents.

3. The pronoun "you" refers to each Defendant and the party answering this Request for Production, their agents and representatives.

4. The term "dynamic memory chip" means any and all computer memory chips that utilize Dynamic Random Access Memory ("DRAM"), that FMA makes, uses, sells, offers for sale or that

are made, used, sold, or offered for sale by FMA in the United States, including the territory of Guam, or imported by FMA into the United States, including the territory of Guam, whether directly or indirectly through an affiliate, consumer, or partner, during the six years prior to the filing of this patent infringement action.

5. "Plaintiff" includes Nanya Technology Corp. and Nanya Technology Corp. U.S.A., all its subsidiaries, parents and affiliates, and all officers, directors, employees, agents, and any other person acting on its behalf.

6. "Defendant" includes Fujitsu Microelectronics America, Inc. ("FMA"), all its subsidiaries, parents, including Fujitsu Ltd., and affiliates, and all officers, directors, employees, agents, and any other person acting on its behalf.

7. "Communication" means the transmittal of information in the form of facts, ideas, inquiries or otherwise.

8. "Identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment and employment title. Once a person has been identified in accordance with this definition, only the name of that person need be listed in response to subsequent requests requiring the identification of that person.

9. "Person" is defined as any natural person or any business, legal or governmental entity or association.

10. "Concerning" means relating to, inferring to, describing, evidencing, or constituting.

11. The conjunctions "and" and "or" shall be construed either disjunctively or conjunctively, as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside its scope.

INSTRUCTIONS

12. Under Rule 34 of the Federal Rules of Civil Procedure, Defendant FMA is required to produce the documents as they are kept in the usual course of business or to organize and label them to correspond with the categories of this request. Accordingly, whenever a document or group of documents is taken out of a file folder, file drawer, file box, or notebook, before the same is produced, Plaintiff requests Defendant FMA to attach thereto a copy of the label on the file folder, file drawer, file box, or notebook from which the document or group of documents was removed.

13. For the purposes of this instruction, persons shall be identified by giving their title and business address both at the time the document was generated by or made available to them and at the present, as well as their name and present home address, to the extent known.

14. If you are aware of any document otherwise responsive to these requests, which document is no longer in your custody or control, identify the name and title of the author, the name and title of the addressee, the date of the document, the subject matter of documents, the last date on which the document was in your control, the person(s) or entity, if any, now in control of the document, the reasons for your disposition or release of the document, all persons who have knowledge of the circumstances surrounding its disposition, and state what knowledge each person has on which document was in your control, the person(s) or entity, if any, now in control of the document, the reasons for your disposition or release of the document, all persons who have knowledge of the circumstance surrounding its disposition, and state what knowledge each such person be.

15. Reference to the singular includes the plural and reference to the plural includes the singular.

16. All claims of privilege and refusal to produce documents based upon any other doctrine (such as the attorney-work product doctrine, etc.) shall be made in conforming the